United States Department of Labor
Employees' Compensation Appeals Board

WILLIAM E. PARKER, Appellant	)	
and	)	**Docket No. 05-1618**
	)	**Issued: October 21, 2005**
U.S. POSTAL SERVICE, POST OFFICE, Trenton, NJ, Employer	)	

Appearances:
Thomas R. Uliase, Esq., for the appellant
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
COLLEEN DUFFY KIKO, Judge
DAVID S. GERSON, Judge
MICHAEL E. GROOM, Alternate Judge

JURISDICTION

On July 27, 2005 appellant filed a timely appeal from the March 25, 2005 merit decision of the Office of Workers' Compensation Programs, which denied his claim for a schedule award. Pursuant to 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction to review the Office's decision.

ISSUE

The issue is whether appellant's November 20, 1995 employment injury caused any permanent impairment of his lower extremities.

FACTUAL HISTORY

On November 20, 1995 appellant, then a 48-year-old mail handler, sustained an injury in the performance of duty while lifting sacks of mail onto a conveyor belt. The Office initially accepted his claim for lumbosacral sprain and later accepted a herniated disc at the L5-S1 level. On October 1, 1999 the Office authorized a right hemilaminectomy and discectomy of right L5-S1, but the surgery was not performed.

On April 23, 2001 appellant filed a claim for a schedule award. His physician, Dr. David Weiss, an osteopath, reported a 12 percent permanent impairment of the left lower extremity based on a sensory deficit of the left S1 nerve root and left calf atrophy and a 7 percent permanent impairment of the right lower extremity based on a sensory deficit of the right S1 nerve root and pain. He stated that appellant's November 20, 1995 employment injury was a competent producing factor.

An Office medical adviser noted that Dr. Weiss had reported normal sensation in the lower extremities as well as normal motor function and reflexes. The medical adviser concluded that there was no basis for a schedule award. He added that a one-centimeter difference in calves was of no consequence because there is often some variation and because appellant's complaints of sciatica were on the right side.

The Office referred appellant, together with the case record and a statement of accepted facts, to Dr. Gregory S. Maslow, a Board-certified orthopedic surgeon, for a second opinion. On August 30, 2001 Dr. Maslow reported that appellant's lower extremity examination was normal. He found no atrophy and noted that Dr. Weiss had found no sensory deficit in the lower extremities. Dr. Maslow offered an impairment rating of five percent of the whole person based on a diagnosis-related estimate of impairment to the back. He stated in an October 9, 2001 report: "If the back cannot be assigned an impairment, there is no impairment based on my evaluation of the lower extremities."

The Office found a conflict in medical opinion between Dr. Weiss and Dr. Maslow and referred appellant, together with the case record and a statement of accepted facts, to Dr. Stanley R. Askin, a Board-certified orthopedic surgeon, for an impartial medical evaluation.

On January 11, 2002 Dr. Askin related appellant's history, his findings on physical examination and his review of diagnostic studies, which revealed degenerative disc changes of all but the L3-4 disc, with bulging of the L5-S1 disc to the right. He diagnosed degenerative disc disease of the lumbar spine but explained that appellant's current complaints were not causally related to work activities. Instead, he stated, the trouble was aging; appellant had, in effect, simply gotten "too old" to comfortably do his original work activities. As a consequence of his various degenerative processes, appellant could and would experience pain with exertion. Dr. Askin added that independent of causation appellant had no back impairment: there was full range of motion, no spasm, no atrophy, no weakness and no sensory loss. He stated that he appreciated the fact that Dr. Weiss had rated sensory loss and atrophy "but such are not in evidence at the present time." With respect to reported lumbar and lower extremity examination findings, he found that Dr. Maslow's appeared to be more accurate: "There is no impairment of the lower extremities either." On September 4, 2003 Dr. Askin clarified that appellant had no measurable impairment in either lower extremity. Noting that if schedule awards were payable only for extremities and organs, then there was no basis for a schedule award in appellant's case.

In a decision dated March 10, 2004, the Office denied appellant's claim for a schedule award based on the opinion of Dr. Askin, the impartial medical specialist. Appellant requested an oral hearing before an Office hearing representative, which was held on November 30, 2004.

In a decision dated March 25, 2005, the hearing representative affirmed the denial of appellant's claim for a schedule award.

LEGAL PRECEDENT

A claimant seeking benefits under the Federal Employees' Compensation Act[1] has the burden of proof to establish the essential elements of his claim by the weight of the evidence,[2] including that he sustained an injury in the performance of duty and that any specific condition or disability for work for which he claims compensation is causally related to that employment injury.[3]

The evidence generally required to establish causal relationship is rationalized medical opinion evidence. The claimant must submit a rationalized medical opinion that supports a causal connection between his current condition and the employment injury. The medical opinion must be based on a complete factual and medical background with an accurate history of the claimant's employment injury, and must explain from a medical perspective how the current condition is related to the injury.[4]

Section 8123(a) of the Act provides in part: "If there is disagreement between the physician making the examination for the United States and the physician of the employee, the Secretary shall appoint a third physician who shall make an examination."[5]

When there exist opposing medical reports of virtually equal weight and rationale, and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.[6]

ANALYSIS

The Office accepted that on November 20, 1995 appellant sustained an injury in the performance of duty. He later filed a claim for a schedule award. He therefore has the burden of

[1] 5 U.S.C. §§ 8101-8193.

[2] *Nathaniel Milton*, 37 ECAB 712 (1986); *Joseph M. Whelan*, 20 ECAB 55 (1968) and cases cited therein.

[3] *Elaine Pendleton*, 40 ECAB 1143, 1145 (1989).

[4] *John A. Ceresoli, Sr.*, 40 ECAB 305 (1988).

[5] 5 U.S.C. § 8123(a).

[6] *Carl Epstein*, 38 ECAB 539 (1987); *James P. Roberts*, 31 ECAB 1010 (1980).

proof to establish that his accepted lumbosacral sprain or herniated disc at the L5-S1 level has caused a permanent impairment to his lower extremities.[7]

A conflict arose between appellant's physician, Dr. Weiss and the Office referral physician, Dr. Maslow. Dr. Weiss reported that appellant's November 20, 1995 employment injury was a competent producing factor in the 12 percent permanent impairment of his left lower extremity and the 7 percent permanent impairment of his right. Dr. Maslow questioned the clinical basis of Dr. Weiss' conclusion. He reported normal findings on examination and no impairment of the lower extremities. The Office properly referred appellant to Dr. Askin, a Board-certified orthopedic surgeon, for an impartial medical opinion to resolve the matter.

The Board finds that Dr. Askin's opinion is based on a proper factual background and is sufficiently well rationalized that it must be accorded special weight in resolving the conflict between Dr. Weiss and Dr. Maslow. The Office provided Dr. Askin with appellant's case record and a statement of accepted facts so that he could base his opinion on a proper factual and medical background. Further, Dr. Askin offered two independent rationales for his conclusion. First, he reasoned that appellant's complaints were not causally related to the November 20, 1995 employment injury: they were merely a consequence of his various degenerative processes, which were typical of a man his age. The significance of this rationale is that even if appellant had some impairment of his lower extremities, the causal connection to federal employment is wanting. But Dr. Askin reasoned further. Independent of causation, he reported full range of motion in appellant's back with no spasm, no atrophy, no weakness and no sensory loss. He specifically found no evidence of the sensory loss and atrophy reported by Dr. Weiss, which was the crux of appellant's claim. For appellant to receive a schedule award, he must establish that a herniated disc at L5-S1 is causing referred weakness or sensory loss to his lower extremities. Dr. Askin denied any such loss.

The Board finds that the opinion of the impartial medical specialist represents the weight of the medical opinion evidence establishes no permanent impairment of the lower extremities causally related to the accepted employment injury. The Board will affirm the Office's March 25, 2005 decision.

CONCLUSION

The Board finds that appellant has not met his burden of proof. The opinion of the impartial medical specialist represents the weight of the medical opinion evidence and establishes no permanent impairment of the lower extremities causally related to the accepted employment injury.

[7] Because neither the Act nor the regulations provide for the payment of a schedule award for the permanent loss of use of the back, no claimant is entitled to such an award. *E.g., Timothy J. McGuire*, 34 ECAB 189 (1982). Amendments to the Act modified the schedule award provisions to provide for an award for permanent impairment to a member of the body covered by the schedule regardless of whether the cause of the impairment originated in a scheduled or nonscheduled member. As the schedule award provisions of the Act include the extremities, a claimant may be entitled to a schedule award for permanent impairment to an extremity even though the cause of the impairment originated in the spine. *Rozella L. Skinner*, 37 ECAB 398 (1986).

ORDER

IT IS HEREBY ORDERED THAT the March 25, 2005 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: October 21, 2005
Washington, DC

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

David S. Gerson, Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board